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**TESTIMONY OF GUADALUPE VICTORIA AGUIRRE, BERTHA JUSTICE FELLOW
ON BEHALF OF THE CENTER FOR CONSTITUTIONAL RIGHTS
BEFORE THE NEW YORK STATE SENATE COMMITTEE ON CODES
IN SUPPORT OF S.3695, REPEALING CIVIL RIGHTS LAW SECTION 50-A**

OCTOBER 24, 2019

The Center for Constitutional Rights (“CCR”) respectfully submits this testimony in support of S.3695, an act to repeal Section 50-a of the New York Civil Rights Law. CCR is dedicated to supporting social justice movements in their fight for liberation and the defense of their civil and human rights. Through litigation, advocacy, and strategic communications, CCR works to challenge and dismantle systems of oppression and build power in communities under threat. We also employ Freedom of Information Act requests and state open records laws to support social justice movements and to uncover potentially abusive and discriminatory government policies and practices, including those of law enforcement agencies. As part of this work, CCR successfully challenged the New York City Police Department’s discriminatory and abusive policing practices in *Floyd et al. v. City of New York*. In a groundbreaking decision, a federal judge found the NYPD liable for a pattern and practice of racial profiling and unconstitutional stops. As a result, the NYPD is currently under a federal monitorship to oversee court-ordered reforms to address its biased and unlawful policing.

I. REPEALING 50-A AFFIRMS NEW YORK’S LONG-STANDING POLICY OF OPEN GOVERNMENT AND COMMITMENT TO THE PROTECTION OF MARGINALIZED COMMUNITIES.

New York has long committed to a policy of open government and “maximum access” of information to the public in order to foster a freer and more democratic society.¹ It is the public’s “right to know the process of governmental decision making,” and to “expose abuses” that enables us to hold our governments accountable.² When it comes to government misconduct, especially that of the police, these foundational principles ring especially true. Yet, Civil Rights Law 50-a (“50-a”), stands in unwavering opposition to New York’s commitment to these principles by creating a nearly impenetrable black box that enables “official secrecy.”³

¹ See *Capital Newspapers v. Whalen*, 69 N.Y.2d 246, 252 (1987); *Friedman v. Rice*, 30 N.Y.3d 461, 475–78 (2017); N.Y. Pub. Off. L. § 84 (1977).

² See *Capital Newspapers*, 69 N.Y.2d at 252; *Friedman*, 30 N.Y.3d at 475–78 (2017); N.Y. Pub. Off. L. § 84 (1977).

³ See *Friedman*, 30 N.Y.3d at 475 (“[FOIL’s] premise [is] that the public is vested with an inherent right to know and that official secrecy is anathematic to our form of government.”) (quoting *Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571 (1979)).

JUSTICE TAKES A FIGHT.

The immense power that police officers hold over the public is indisputable. Police, unlike most other public servants, “have the power to terminate constitutional protected liberty,” most importantly, the state sanctioned authority to take a life; “with this power comes great responsibility, as well as the need for appropriate oversight.”⁴ Because police officers can and do wield this power, the public has an equally immense, if not exceeding, need for transparency and information to ensure police departments behave in ways that are lawful and consistent with democratic and community values.

These principles and commitments are shared nationwide. Conversations about and movements for police accountability are demanding, and achieving, increased transparency and access to information. New York, which has prided itself on leading the nation with progressive principles and efforts to protect historically vulnerable and marginalized communities, lags far behind by having 50-a, the most draconian secrecy law in the nation, on its books. Moreover, police departments like the New York Police Department (“NYPD”) and New York courts have increasingly broadened the scope of 50-a, distorting the law’s original narrow intent.⁵ As it stands, interpretations of 50-a have severely restricted the public’s access to *redacted* records,⁶ *substantiated* civilian complaint histories,⁷ and even *summaries* of officer discipline.⁸ This stands in sharp contrasts to the laws in at least twelve states that permit disclosure of information relating to officer misconduct and discipline.⁹

Locally, numerous stakeholders have recognized the urgent need to uphold our commitment to meaningful transparency, including members of the media, the NYC Bar Association, and family members of people who have been killed by police officers.¹⁰

⁴ See *Cordero v. City of New York*, 282 F. Supp. 3d 549, 555 (E.D.N.Y. 2017) (Weinstein, J.).

⁵ See Brendan J. Lyon, *Court Rulings Shroud Records*, ALBANY TIMES UNION, Dec. 15, 2016 (“State Senator Frank Padavan . . . said a 1976 amendment to state law was not intended to prohibit the public release of records related to police misconduct.”), <https://www.timesunion.com/tuplus-local/article/Court-rulings-shroud-records-10788517.php>.

⁶ *New York Civil Liberties Union v. New York Police Dep’t.*, 32 N.Y.3d 556 (2018).

⁷ *Luongo v. CCRB Records Officers & Daniel Pantaleo*, 150 A.D.3d 13 (1st Dep’t. 2017).

⁸ Thomas Tracy, *Judge Stops NYPD from Putting Police Disciplinary Summaries Online*, N.Y. DAILY NEWS, Mar. 12, 2019, <https://www.nydailynews.com/new-york/nyc-crime/ny-metro-injunction-barring-pba-summaries-20190312-story.html>.

⁹ See NEW YORK CITY BAR CIVIL RIGHTS & CRIM. CT. COMM., COMM. REPORT: ALLOW FOR PUB. DISCLOSURE OF POLICE RECORDS RELATING TO MISCONDUCT: REPEAL CRL 50-A 4-5 (2018), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/allow-for-public-disclosure-of-police-records-relating-to-misconduct-repeal-crl-50-a>; Cynthia H. Conti-Cook, *Open Data Policing*, 106 GEO. L.J. (2017), <https://georgetownlawjournal.org/articles/243/open-data-policing/pdf>.

¹⁰ See, e.g., *id.*; Council of the City of N.Y., Res. 0750-2019, available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3842679&GUID=A628B57F-C90C-4DA0-976A-CBD8B2D83DDA&Options=&Search=>; Rachel Silberstein, *Advocates Push for Repeal of 50-a Ahead of Session*, ALBANY TIMES UNION, Dec. 24, 2018, <https://www.timesunion.com/news/article/NYS-50-a-13488713.php>; Editorial Bd., *Chokeholds & Police Abuse, Kept from the Public*, N.Y. TIMES, June 12, 2019, <https://www.nytimes.com/2019/06/12/opinion/police-brutality-discipline-eric-garner.html>.

Repealing 50-a is a critical and necessary step towards affirming New York’s commitment to those communities who experience abusive and discriminatory policing, by removing a harmful barrier to transparency, accountability, and justice.¹¹

II. REPEALING 50-A IS A MATTER OF PUBLIC SAFETY, PARTICULARLY FOR HISTORICALLY VULNERABLE AND MARGINALIZED COMMUNITIES.

The importance of the legitimacy of our government institutions and the need for the public’s trust in them cannot be overstated. Legitimacy and trust are particularly important in the law enforcement context because of the impact on the public’s daily lives and safety. Time and again, communities, especially those most directly impacted by officer misconduct, have called for greater access to information about the public employees meant to protect them. Without this information, the public cannot meaningfully engage in discourse over how to address the government abuses that harm them, their families, and communities. Moreover, lack of transparency around conduct that undermines public confidence in its institutions can discourage the filing of complaints.¹² **Instead of promoting public safety, 50-a turns it on its head by providing abusive and potentially dangerous officers—and the institutions that do not adequately remediate them—the benefit of hiding behind 50-a’s cloak of secrecy.¹³**

The Center for Constitutional Rights and the class of plaintiffs in *Floyd v. City of New York*, know first hand about the detrimental effects unlawful and abusive policing has on the lives of New Yorkers. *Floyd* exposed the NYPD’s institutional practice of racial profiling and unlawful stop, question, and frisks of Black and Latinx New Yorkers.¹⁴ Importantly, the case also exposed NYPD’s “deliberate indifference” to its officers’ abuses: “when confronted with evidence of unconstitutional stops, the NYPD routinely denies the accuracy of the evidence, *refuses to impose meaningful discipline*, and fails to effectively monitor the responsible officers for future misconduct.”¹⁵ *Floyd* exemplifies the potential for police to abuse their power and cause real and lasting harm to historically marginalized communities on a grand scale. For example, the case proved that the NYPD failed to adequately investigate and impose discipline in response to allegations of racial profiling.¹⁶ A recent report by New York City’s Office of the Inspector General reveals disturbing and continuing problems with regards to addressing racial profiling allegations in the NYPD—not one of nearly 2,500 complaints of racial profiling or biased policing

¹¹ *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971) (“In the main it is the police and the lower court Bench that convey the essence of our democracy to the people . . . Justice, if it can be measured, must be measured by the experiences the average citizen has with the police. . .”).

¹² See *Floyd v. City of New York*, No. 08-cv-1034, Dkt. # 373, at 109–10 (hereinafter “*Floyd Liability Op.*”).

¹³ Contrary to some contentions, the repeal of 50-a does not implicate officer privacy and safety. Existing Freedom of Information Law provides robust protections for important officer information, including, addresses, and social security and medical information. See N.Y. Pub. Offs. L. § 87(2); *Matter of Obiajulu v. City of Rochester*, 213 A.D.2d 1055 (4th Dep’t 1995) (exempting from disclosure under FOIL employees’ personal information); *Lyon v. Dunne*, 180 A.D.2d 922 (3d Dep’t 1992) (holding that addresses, phone number, and birth dates must be redacted in records).

¹⁴ See *Floyd v. City of New York*, No. 08-cv-1034, Dkt. # 373 (hereinafter “*Floyd Liability Op.*”).

¹⁵ *Floyd Liability Op.* at 104–05 (emphasis added).

¹⁶ See *id.* at 110.

between 2014 and 2017 has been substantiated by the department.¹⁷ Consequently, this implies that not one of those complaints resulted in adequate discipline. Even if this is not the case, the public cannot know for certain due to the severe restrictions of 50-a. In addition, *Floyd* revealed that the NYPD has historically failed to pursue any meaningful discipline against officers with *substantiated* complaints by the Civilian Complaint Review Board (“CCRB”) and historically downgraded the CCRB’s recommended discipline.¹⁸

Similar to the issues with biased policing within the NYPD, we can glean from leaks of information to the media and independent reporting (notwithstanding the substantial barriers to information erected by 50-a) that issues around lack of effective or meaning discipline are on-going.¹⁹ Even for serious misconduct, officers continue to be given mere oral reprimands, “Instructions” or sent to training (the predominant disciplinary penalties), if disciplined at all.²⁰ Perhaps most striking, reporting in 2018 revealed that the NYPD had failed to discipline or fire officers who engaged in misconduct ranging from sexual assault, stomping on someone’s head, falsifying documents, conducting illegal searches, and more.²¹ These are disturbing trends to say the least, and 50-a stands as a barrier to the public’s understanding of why these trends have occurred and perhaps more importantly, why they endure.

As a result of the court’s findings and rulings in *Floyd*, the NYPD is currently under a federal monitorship that is overseeing and implementing court ordered reforms to remediate the issues that came to light during trial. Furthermore, a court-ordered Facilitator, Honorable Judge Ariel Belen, oversaw a consultative process with communities most impacted by the NYPD’s abusive and discriminatory practices to assess and develop additional and necessary reforms that would begin to remediate these issues. Judge Belen tackled, amongst others, issues of discipline and noted the importance of transparency and accountability, and centering the experiences of directly-impacted community members.²² Unsurprisingly, Judge Belen recommended critical disciplinary reforms, including timely disciplinary actions, publication of monthly discipline reports, progressive discipline, and most importantly, increased attention to the public understanding of disciplinary standards.²³ As a barrier to public information about law enforcements disciplinary

¹⁷ NYC DEP’T OF INVESTIGATION, OFF. OF THE INSPECTOR GEN., COMPLAINTS OF BIASED POLICING IN NEW YORK CITY: AN ASSESSMENT OF NYPD’S INVESTIGATION, POLICIES, AND TRAINING 2 (2019), https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf.

¹⁸ See *Floyd* Liability Op. at 108–10.

¹⁹ See, e.g., MARY JO WHITE ET AL., REPORT OF THE INDEPENDENT PANEL ON THE DISCIPLINARY SYSTEM OF THE NEW YORK CITY POLICE DEP’T (2019); NYC CIVILIAN COMPLAINT REV. BD., ANNUAL REPORT 34 (2017) (noting that NYPD pursued no disciplinary action in 28% of civilian complaints before the Board in 2017) (hereinafter “CCRB 2017 Annual Report”), https://www1.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2017_annual.pdf; Kendall Taggart & Mike Hayes, *Secret NYPD Files: Officers Who Lie & Brutally Beat People Can Keep their Jobs*, BUZZFEED, Mar. 5, 2018, <https://www.buzzfeednews.com/article/kendalltaggart/secret-nypd-files-hundreds-of-officers-committed-serious>.

²⁰ See CCRB 2017 Annual Report, *supra* note 19; Ninth Report of the Independent Monitor, *Floyd v. City of New York*, No. 1:08-cv-01034-AT, Dkt # 680-1 (Jan. 11, 2019), at 57–60 (noting ‘Instructions’ and/or ‘Trainings’ represented approximately 39 percent of cases in 2014; 45 percent in 2015; 53 percent in 2016; and 56 percent in 2017).

²¹ Kendall Taggart & Mike Hayes, *The NYPD’s Secret Files*, BUZZFEED, April 16, 2018, <https://www.buzzfeednews.com/article/kendalltaggart/nypd-police-misconduct-database-explainer>.

²² See HON. ARIEL E. BELEN, NEW YORK CITY JOINT REMEDIAL PROCESS FINAL REPORT & RECOMMENDATIONS iv, 218–299 (2018).

²³ *Id.* at 222–25.

systems and officer misconduct, 50-a severely undermines the public's ability to ensure these important recommendations are implemented in any meaningful way.

The *Floyd* case, and indicia of outstanding problems, underscores the crucial need for the public to understand the disciplinary systems of their police departments in order to provide oversight and remedial efforts, including meaningful and effective discipline, none of which can happen without true transparency.²⁴ In light of these systemic issues, New York should not continue to protect potentially violent and dangerous officials, and the departments that fail to adequately discipline them, at the expense of vulnerable and directly-impacted communities.

III. CONCLUSION

The time to repeal 50-a is now and the reasons are plentiful. 50-a undermines important and long-lasting policies of open government, government accountability, and the commitment to protecting the rights of vulnerable and marginalized communities. It is no secret that the crucial need for police accountability remains in New York and nationally. By repealing 50-a, New York will take an important step toward increasing police accountability, public safety, and justice.